Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LINDA DAGI,
Petitioner,

v.

CHRIS MOTORS CORPORATION,
BAYERISCHE MOTOREN WERKE, A.G.,
and BMW OF NORTH AMERICA, INC.,
Respondents.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

The questions presented include:

1. Whether the Eleventh Circuit Court of Appeals erred in misconstruing and misapplying the decision in Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987), with respect to the case *sub judice*, since the initial Complaint was, in fact, a well-pleaded Complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §1981, 1989) and erred in not reversing the District Court and directing that the case be remanded to the State Court of Fulton County, Georgia, pursuant to 28 United States Code §1447 (c), since Chris Motors Corporation's attempted removal sixteen moths after receipt of said initial Complaint was untimely, in that the case was not removed to the United States District Court within 30 days of the receipt of the initial Complaint stating a claim for federal odometer fraud, as required by the removal statute 28 United States Code §1446(b)?

2. Whether the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of fact as to whether Defendant Chris Motors Corporation is liable for common law fraud and negligent misrepresentations recklessly made, in connection with odometer disconnection and tampering and false representations as to the actual mileage on the BMW automobile, erred in overlooking and not considering decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia [including Harris v. Mullins, 32 Ga. 704 (1861); Larey v. Taliaferro, 57 Ga. 443 (1876); City Dodge v. Garnder, 232 Ga. 766, 208 S.E. 2d 794 (1974); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1982); Rivers v.

BMW of North America, Inc., 214 Ga. App. 880, 449 S.E. 2d 337 (1994); Harmon v. BMW of North America, Inc., Case No. A94A21003 in the Court of Appeals of Georgia, decided January 26, 1995 (a copy of said unreported decision is included in the Appendix; and Crown Ford, Inc. v. Crawford, 221 Ga. App. 881, 473 S.E. 2d 554 (1996), which cases hold that a plaintiff can make an election to sue for common law fraud and negligent misrepresentations recklessly made, without rescinding a contract to purchase a vehicle, and holding that such actions for fraud and negligent misrepresentation are not barred by a merger clause contained in the sales contract and are not barred by an "as is" clause contained in a disclaimer of warranties,] which decisions are binding precedents under Erie R. Co. v. Tompkins 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and erred in not reversing the District Court and denying Defendant Chris Motors Corporation's Motion for Summary Judgment, based upon the binding Georgia precedents, pursuant to Erie R. Co. v. Tompkins?

3. Whether the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of material facts as to whether Plaintiff Linda Dagi is entitled to recover on her federal odometer fraud claim under 15 United States Code §§ 1981, 1989, erred in overlooking and not considering decisions of the old (pre-November 1, 1980) Fifth Circuit Court of Appeals and decisions of the Eleventh Circuit Court of Appeals [Nieto v. Pence, 578 F.2d 640 (5th Cir. 1978); and Huycke v. Greenway, 876 F.2d 94 (11th Cir. 1989), which hold that a Plaintiff need not show actual intent to defraud in a federal odometer fraud claim, but may establish a violation of the Federal Odometer Act, by relying on circumstantial evidence to show constructive knowledge that the actual miles on a vehicle are greater than the miles shown on the odometer and

greater than the miles shown on the federal odometer disclosure statement], which decisions are binding precedents under Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 11th Cir. 1980, and the doctrine of *stare decisis* under Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S.Ct. 560, 116 L. Ed. 2d 560 (1991) and the rule of binding precedent under Johnson v. DeSoto County Board of Commissioners, 72 F.3d 1556 (11th Cir. 1996).?

4. Whether the United States District Court violated cardinal rules regarding decisions on motions for summary judgment, when in its July 31, 1995 and November 30, 1995 orders granting the motions for summary judgment of Defendants Chris Motors Corporation, Bayerische Motoren Werke, A.G. and BMW of North America, Inc., Appendix pages 26a-44a and pages 68a-90a, the District Court weighed the evidence and made credibility findings, contrary to the controlling legal standards applicable to motions for summary judgment as stated in Clemons v. Dougherty County, Georgia, 684 F.2d 1294, 1297 (11th Cir. 1982); Warrior Tombigbee Transportation Company, Inc. v. M/V Nan Fung, 695 F.2d 1294, 1297 (11th Cir. 1983); Samples on Behalf of Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) and Big Apple BMW, v. BMW of North America, Inc., 974 F. 2d 1358 (3rd Cir. 1992) and the United States Court of Appeals for the Eleventh Circuit abdicated its duty to review, recognize and reverse the erroneous approach taken by the District Court in weighing this evidence and making credibility findings in deciding the motions for summary judgment of Chris Motors Corporation, Bayerische Motoren Werke, A.G., and BMW of North America, Inc.?

5. Whether the erroneous decisions of the United States Court of Appeals for the Eleventh Circuit was reached because the Court of Appeals arbitrarily denied Appellant Linda Dagi's request for oral argument and arbitrarily assigned the case to the Non-Argument Calendar, contrary to the Court of Appeals' policy to grant oral argument where important and complex issues are presented on appeal and in complete disregard of the writings of distinguished jurists, including United States Circuit Judge Myron S. Bright, United States Circuit Judge Richard S. Arnold, Mr. Chief Justice Hughes, Mr. Justice Harlan, Mr. Justice Jackson, and Mr. Justice Rehnquist?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit included:

Linda Dagi
Plaintiff/Appellant

Chris Motors Corporation
Defendant/Appellee

Bayerische Motoren Werke, A.G. (BMW AG)
Defendant/Appellee

BMW of North America, Inc. (BMW NA)
Defendant/Appellee

BMW NA is a wholly owned subsidiary of the parent company BMW AG. See Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F. 3d 745 (1st Cir. 1994) (Opinion by Chief Judge Breyer, who is now Mr. Justice Breyer).

These are no other parent companies or non-wholly owned subsidiaries that are required to be listed by Rule 29.6 of the Rules of the Supreme Court of the United States.

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On Petition For Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Linda Dagi respectfully petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in Case Numbers 95-9501 and 96-8025.

OPINIONS BELOW

The November 21, 1996 Opinion and Judgment of the Eleventh Circuit Court of Appeals in Case numbers 95-9501 and 96-8025) is reproduced in the Appendix at 13a-15a and pages 16a-17a. The November 21, 1996 Opinion and

Judgment is not officially reported, and the decision appears in a list of decisions without reported opinions in 102 F.3d 535(1996), with a notation that the case should not be cited without attaching a copy of the Opinion and Judgement. The January 22, 1997 Order of the Eleventh Circuit panel denying Petitioner's combined petition for panel rehearing and suggestion for rehearing *en banc*, is unpublished, and is reproduced in the Appendix at pages 18a-19a.

The July 31, 1995 Order and November 2, 1995 Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, entered by Judge Julie Carnes, granting Defendant Chris Motors Corporation's motion for summary judgment are unpublished and are reproduced in the Appendix at pages 26a-44a and page 63a.

The November 30, 1995 Order and December 1, 1995 Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division entered by Judge Julie Carnes, granting Defendants Bayerische Motoren Werke, A.G. and BMW of North America, Inc.'s motion for summary judgment are unpublished and are reproduced in the Appendix at pages 68a-90a and 91a.

JURISDICTION

The Defendant Chris Motors Corporation claims that the United States District Court had jurisdiction of this case based upon a claim under the Federal Odometer Act, 15 United States Code §1981, 1989, which is a federal question under 28 United States Code §1331.

State courts have concurrent jurisdiction of federal odometer fraud claims under 15 United States Code §1989(b).

The United States Court of Appeals has jurisdiction of Case Number 95-9501 and 96-8025 under 28 United States Code §1291, which provides that the Courts of Appeals of the United States have jurisdiction of appeals from all final decisions of the District Courts of the United States.

The United States Supreme Court has jurisdiction to issue the Writ of Certiorari under 28 United States Code §1254 (1).

STATUTORY PROVISIONS INVOLVED

The statute pertaining to jurisdiction for writs of certiorari in the United States Supreme Court is 28 United States Code §1254, which provides in pertinent part, as follows:

28 United States Code §1254,
Court of Appeals; Certiorari; Certified Questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions ore require the entire record to be sent up for decision of the entire matter in controversy.

The statute pertaining to jurisdiction of federal questions in the United States District Courts is 28 United States Code §1331, which provides in pertinent part, as follows:

28 United States Code §1331.
Federal Question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Statutes pertaining to removal of cases from state courts to United States district Courts and remand of cases from United States District Court to state courts include 28 United States Code §1446 and §1447, which provide in pertinent part, as follows:

28 United States Code §1446.
Procedure for removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such actions pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt of the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which

such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

28 United States Code §1447
procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued not such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. an order remanding the case may

require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

In 1972, Congress enacted the Motor Vehicle Informative and Cost Savings Act in Public Law 92-513, October 20, 1972, 86 statues 947, which was codified as 15 United States Code §1981 *et seq*. Provisions pertaining to odometer fraud were contained in Public Law 92-513, Title IV, §401 et seq., October 20, 1972, 86 statutes 961, which was codified as 15 United States Code §§1989 through 1991. Statutory provision pertinent to this case include:

15 United States Code §1981
Congressional findings and declaration of purpose

The congress hereby finds that purchasers, when buying motor vehicles, rely heavily on the odometer reading as an index of the condition and value of such vehicle; that purchasers are entitled to rely on the odometer reading as an accurate reflection of the mileage actually traveled by the

vehicle; that an accurate indication of the mileage traveled by a motor vehicle assists the purchaser in determining its safety and reliability; and that motor vehicles move in the current of interstate and foreign commerce or affect such commerce. It is therefore the purpose of this subchapter to prohibit tampering with odometers on motor vehicles and to establish certain safeguards for the protection of purchasers with respect to the sale of motor vehicles having altered or reset odometers.

15 United States Code §1982.
Definitions

As used in this subchapter-

(1) The term "dealer" means any person who has sold 5 or more motor vehicles in the past 12 months to purchasers who in good faith purchase such vehicles for purposes other than resale.-

(2) The term "distributor: means any person who has sold 5 or more vehicles in the past 12 months for resale.

(3) The term "odometer" means an instrument for measuring and recording the actual distance a motor vehicle travels while in operation; but shall not include any auxiliary odometer designed to be reset by the operator of the motor vehicle for the purpose of recording mileage on trips.

(4) The term "repair and replacement" means to restore to a sound working condition by replacing the odometer or any part hereof or ;by correcting what is inoperative.

(5) The term "transfer" means to change ownership by purchase, gift, or any other means.

15 United States Code §1983.
Devices causing odometer to register other than true mileage drive prohibited

No person shall advertise for sale, sell, use, or install or cause to be installed, any device which causes an odometer to register any mileage other than the true mileage driven. For purposes of this section, the true mileage driven is that mileage driven by the vehicle as registered by the odometer within the manufacturer's designed tolerance.

15 United States Code §1984.
Change of mileage indicated on odometer prohibited

No person shall disconnect, reset, or alter or cause to be disconnected, reset, or altered, the odometer of any motor vehicle with intent to change the number of miles indicated thereon.

15 United States Code §1985.
operation of Motor Vehicle with knowledge of disconnection or non-functional odometer prohibited

No person shall, with intent to defraud, operate a motor vehicle on any street or highway knowing that the odometer of such vehicle is disconnected or nonfunctional.

15 United States Code §1986
Conspiracy to violate odometer requirements

No person shall conspire with any other person to violate section 1983, 1984, 1985, 1987, or 1988 of this title.

* * *

15 United States Code §1989.
Civil actions to enforce liability for violations of odometer requirements; amount of damages; jurisdiction; period of limitations.

(a) Any person who, with intent to defraud, violates any requirement imposed under this subchapter shall be liable in an amount equal to the sum of -

(1) three times the amount of actual damages sustain or $1,500., whichever is greater; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determine by the court.

(b) An action to enforce any liability created under subsection (a) of this section, may be brought in a United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within two years from the date on which the liability arises.

NOTE: The Federal Odometer Act contained in Title IV of the Motor Vehicle Inforamtion and Cost Savings Act, 15 United States Code §§1981 - 1991 (1972) was repealed on July 5, 1994, by Public Law 103-292, §7b, 108 Statutes 1379, and was replaced by 49 United States Code §§32701 through 32710. Because the relevant activities occurred in 1992 before the old Act, 15 United States Code §§1981 - 1991 was repealed, the provisions of the old Act are applicable to this case. Roberts v. Robert v. Rohrman, Inc., 909 F. Supp. 545 (N.D. Ill. 1995)

STATEMENT OF THE CASE

This is an action in tort and fraud brought by Linda Dagi, Plaintiff/Appellant, against Defendants Bayerische Motoren Werke, A.G. (hereinafter referred to as "BMW AG"), BMW of North America, Inc. (hereinafter referred to as "BMW NA"), and Chris Motors Corporation (hereinafter referred to as "Chris Motors"). The case was originally filed on March 19, 1993, in the State Court of Fulton County as Case Number 93-VS-0070409-F. See Plaintiff's Complaint for Damages (R 1-1-5; Document #1)

On August 12, 1994, the Defendants removed this case to the United States District Court for the Northern District of Georgia, where it was docketed as Civil Action File No. 1:94-CV-2135-JEC. On Monday, September 12, 1994, Plaintiff filed a timely Motion to Remand. See Plaintiff's Motion to Remand, Brief in Support of Plaintiff's Motion to Remand, Affidavit Regarding Deposition of Neil Christman, Affidavit of Joyce Christman, and Notice of Motion to Remand Removed Action, all of which documents were filed in this Court on September 12, 1994 (R 3-5-1;) See also, Plaintiff's Reply Brief in Support of Plaintiff's Motion to Remand filed October 13, 1994 (R 4-9-1;) and the October 24, 1994 Order denying Plaintiff's Motion to Remand (R 4-10-1;).

The United States Court of Appeals did not reverse the erroneous October 24, 1994 Order denying Plaintiff's Motion to Remand but erroneously affirmed the denial of Plaintiffs' Motion to Remand, contrary to binding precedents.

On July 31, 1995, the District Court entered an Order granting Defendant Chris Motors Corporation's Motion for Summary Judgment. (R-54-1); On November 30, 1995, the

District Court entered an Order granting BMW AG's and BMW NA 's motion for summary judgment (R 9-84-1; Document #84, page 1). In both the July 31, 1995 Order and the November 30, 1995 Order, the District Court ignored affidavits and other evidence favorable to Plaintiff, weighed and resolved conflicts in the evidence, made credibility findings, and decided factual issues; and Plaintiff Linda Dagi submits that the Draconian approach taken by the District Court is inconsistent with the record which shows numerous genuine issues of material facts which establish the liability of Chris Motors, BMW AG, and BMW NA, and is contrary to the State and Federal substantive law and is contrary to the legal standards to be applied in ruling on motions for summary judgment. The United States Court of Appeals did not reverse the erroneous July 31, 1995 Order and November 30, 1995 Order of the District Court granting numerous judgments for the Defendants, but erroneously affirmed said orders, contrary to binding precedents, without analysis or discussion. The Eleventh Circuit's entire ruling on the erroneous grants of the motion for summary judgment consists of the erroneous conclusion at page 3 of its November 21, 1996 Order and Judgment: "The remainder of Dagi's assertions of error are rejected for the reasons set forth in the district courts thorough and thoughtful orders dated July 31, 1995 and November 30, 1995," Appendix, page 15a.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Petitioner Linda Dagi respectfully submits that the issues addressed in her Petition for Writ of Certiorari are matters of importance, gravity and great concern to the Bench, the Bar, and the public which go to the very heart of the duty of the judiciary to uphold established principles of law that are

binding precedents under the doctrine of *stare decisis* and the rule of binding precedent. These issues are, as follows:

1. The Petition for Writ of Certiorari should be granted, for the reason that the Eleventh Circuit Court of Appeals erred in misconstruing and misapplying the decision in Caterpiller, Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96L. Ed. 2d 318 (1987), with respect to the case *sub judice*, since the initial Complaint was, in fact, a well-pleaded Complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §1981, 1989) and erred in not reversing the District Court and directing that the case be remanded to the State Court of Fulton County, Georgia, pursuant to 28 United States Code §1447 (c), since Chris Motors Corporation's attempted removal sixteen months after receipt of said initial Complaint was untimely, in that the case was not removed to the United States District Court within 30 days of the receipt of the initial Complaint stating a claim for federal odometer fraud, as required by the removal statute 28 United States Code §1446(b).

The decisions of the District Court and the Eleventh Circuit Court of Appeals are in conflict with the decisions of this Court pertaining to the well-pleaded complaint rule and are contrary to the doctrine of *stare decisis* and the rule of binding precedent. Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S. Ct. 560, 116 l.Ed 2d 560 (1991); and Johnson v. DeSoto County board of Commissioners 72 F. 3d 1556 (11th Cir. 1996).

The appellate panel erred in misconstruing and misapplying the Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed. 2d 318, (1987) decision to the case sub judice, since the initial complaint was, in fact, a well-

pleaded complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §§1981, 1989). The Defendants attempted removal sixteen months after receipt of said initial complaint was untimely, in that the case was not removed to the United States District Court within 30 days of the receipt of the initial complaint stating a claim for federal odometer fraud, as required by the removal statute, 28 United States Code §1446(b).

Petitioner shows that the Writ of Certiorari, should be granted, since the November 21, 1996 Opinion and Judgment of the appellate panel of the Eleventh Circuit Court of Appeals, Appendix pages 13a-15a, 16a-17a, constitutes a radical departure from binding precedents regarding removal jurisdiction, which hold that well-pleaded complaints must be removed within 30 days. Consideration by the Supreme Court is necessary to secure and maintain uniformity of decisions in this Court, as to the well-pleaded complaint doctrine as set out in cases of the Eleventh Circuit Court of Appeals and the Supreme Court of the United States. This is a question of exceptional importance to the Bench, the Bar, and the public, in that the appellate panel decision is in conflict with binding precedents and causes confusion and lack of uniformity as to the applicable law.

In its November 21, 1996 Opinion and Judgment, the appellate panel erred in misconstruing and misapply the decision in Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed. 2d 318 (1987) to the case sub judice, since the initial complaint was, in fact, a well-pleaded complaint that contained all of the elements of a federal odometer fraud claim under 15 United States Code §§1981, 1989.

The essential elements of a federal odometer fraud claim is stated paragraphs 33 through 38 of the initial complaint, as follows:

Paragraph 33

Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had been driven only 5,351 miles via an Odometer Disclosure Statement;

Paragraph 34

At the time in which Defendant Chris Motors represented and certified to Plaintiff Dagi that the subject BMW 535i automobile had only 5,351 miles through said Odometer Disclosure Statement, Defendant Chris Motors knew that such representation to Plaintiff Dagi as to the mileage of said vehicle was false;

Paragraph 35

Defendant Chris Motors made such representation regarding the mileage of said BMW 535i vehicle with the intention and purpose of deceiving Plaintiff Dagi;

Paragraph 36

Plaintiff Dagi reasonably relied upon Defendant Chris Motors' representation and certification as to the mileage of the subject BMW 535i automobile;

Paragraph 37

As a result of Defendant Chris Motors' fraudulent representation with respect to the mileage of the subject BMW 535i automobile, Plaintiff Dagi sustained damages;

Paragraph 38

By reason of the foregoing, Plaintiff Dagi is entitled to recover from Defendant Chris Motors damages in such an amount as may be shown by the evidence and determined by the jury in their enlightened conscience.

In its November 21, 1996 Opinion and Judgment, Appendix pages 13a-15a, 16a-17a, the appellate panel erred in misconstruing and failing to apply applicable authorities pertaining to well-pleaded complaints, including: Caterpillar, Inc. v. Williams 482 U.S. 386, 107 S. Ct. 2423, 96 L.Ed. 2d 318 (1987); Gable v. Local Union #387, 695 F.Supp. 1174 (N.D. Ga. 1988) (in which the court held, at page 1175: "The reviewing court looks to the sub-stance of the complaint and not the labels used in it."); Golke v. Lee Lumber & Building Materials Corporation, 671 F.Supp. 568 (1987) (in which the court held, at page 571: "A close scrutiny of the amended compliant reveals that the content and substance of the initial complaint remains unchanged . . . Lee Lumber should have filed its removal petition within 30 days of receiving Golke's initial complaint."); Downey v. Geary-Wright Tobacco Company, 39 F.Supp 33 (E.D. Ky. 1941) (in which the court stated, at page 36: "As the court takes judicial notice of the federal law involved, the omission of specific reference thereto in the pleadings is immaterial."); Kolkin v. Gotham Sportswear, 10 F.Supp. 682 (S.D. N.Y. 1935) (in which the Court stated, at page 684: "It does not matter that the Sherman

Anti-Trust Act and the Clayton Act are not mentioned by name in the complaint."); and 76 Corpus Juris Secundum Removal of Causes §75, at page 968, wherein it is stated: "The omission from Plaintiff's pleading of a specific reference to any law of the United States does not prevent removal where the allegations of such pleading show that the suit arises under a law of the United States."

The initial well-pleaded complaint setting forth all of the elements of a federal odometer fraud claim was received by Chris Motors Corporation on April 7, 1993, and was received by BMW of North America, Inc. on March 22, 1993. (See September 12, 1994 Affidavit of Thomas Allan Rice in Support of Plaintiff's Motion to Remand, (R 3-5-23;). The attempted removal took place on August 12, 1994, when the Defendants filed a Petition for Removal (R 1-1-1;) and Notice of Removal (R 1-1-254;)

The Defendants' attempted removal sixteen months after receipt of said complaint was untimely, in that the case was not removed to the United States District Court within thirty days of the receipt of the initial complaint stating a claim for federal odometer fraud as required by the removal statute, 28 United States Code §1446(b).

Therefore, the District Court committed reversible error in its October 24, 1994 Order in denying Plaintiff's Motion to Remand to state court pursuant to 28 United States Code §1447(c) (R 4-10-11;) and the appellate panel of the Eleventh Circuit Court of Appeals committed reversible error in affirming the denial of Appellant Linda Dagi's Motion to Remand to state court. Therefore, the Writ of Certiorari should issue, the decisions of the District Court and Eleventh Circuit Court of Appeals should be reversed and the case remanded to

the State Court of Fulton County, pursuant to 28 United States Code §1447 (c).

2. The Petition for Writ of Certiorari should be granted, for the reason that the decisions of the United States District Court and the Eleventh Circuit Court of Appeals violate the principle established by Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), that state law issues of tort liability for cases occuring in Georgia are governed by the decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia.

The District Court and the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of fact as to whether Defendant Chris Motors Corporation is liable for common law fraud and negligent misrepresentations recklessly made, in connection with odometer disconnection and tampering and false representation as to the actual mileage on the BMW automobile, erred in overlooking and not considering decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia [including Harris v. Mullins, 32 Ga. 704 (1861); Larey v. Taliaferro, 57 Ga. 443 (1876); City Dodge v. Garnder, 232 Ga. 766, 208 S.E. 2d 794 (1974); Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1982); Rivers v. BMW of North America, Inc. 214 Ga. App. 880, 449 S.E. 2d 337 (1994); Harmon v. BMW of North America, Inc. Case No. A94A21003 in the Court of Appeals of Georgia, decided January 26, 1995 (a copy of said unreported decision is included in the Appendix as Exhibit 23, at page 141a); and Crown Ford, Inc. v. Crawford, 221 Ga. App. 881, 473 S.E. 2d 554 (1996), which cases hold that a plaintiff can make an election to sue for common law fraud and negligent misrepresentations recklessly made, without rescinding a

contract to purchase a vehicle, and hold that such actions for fraud and negligent misrepresentation are not barred by a merger clause contained in sales contract and are not barred by an "as is" clause contained in a disclaimer of warranties], which decisions are binding precedents under Erie R. Co. v. Tompkins 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

The July 31, 1995 decisions of the District Court granting Defendant Chris Motors Corporation's motion for summary judgment, Appendix pages 26a-44a and the decision of the Eleventh Circuit Court of Appeals affirming the grant of Chris Motors Corporations' motion for summary judgment , Appendix, pages 13a-15a, 16a-17a are erroneous and should be reversed. Therefore, the Writ of Certiorari should issue, the decisions of the District Court and the Eleventh Circuit Court of Appeals regarding the granting of Chris Motors Corporation's motion for summary judgment should be reversed, and the case remanded for trial on the merits of Plaintiff Linda Dagi's claims for common law fraud and negligent misrepresentations recklessly made in the States Court of Fulton County, Georgia.

Petitioner Linda Dagi shows that a Writ of Certiorari should be granted, since the November 21, 1996 Opinion and Judgment of the appellate panel of the Eleventh Circuit Court of Appeals, Appendix, pages 16a-17a constitutes a radical departure from established law, in that the appellate panel overlooked and did not consider decisions of the Georgia Supreme Court and the Georgia Court of Appeals that are binding precedents under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938). Consideration by the Supreme Court on Writ of Certiorari is necessary to secure and maintain adherence to the principle established in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

This is a question of exceptional importance to the Bench, the Bar, and the public, in that the appellate panel decision is in conflict with binding precedents and causes confusion and lack of uniformity as to the applicable law.

Said binding precedents clearly establish that there are genuine issues of material fact as to whether Defendant Chris Motors Corporation is liable for common law fraud and negligent misrepresentations recklessly made in connection with odometer disconnection and tampering and false representations as to the actual mileage on the BMW automobile.

Said binding precedents also clearly establish that, under Georgia law, a plaintiff has an election of remedies in an action involving the purchase of an automobile and can affirm the contract and sue for damages for common law fraud and negligent misrepresentations recklessly made.

Said binding precedents also clearly establish that the Plaintiff Linda Dagi's claims of fraud and negligent misrepresentations recklessly made are not barred by the merger clause contained in the Retail Buyer's Order or the "as is" language contained in the Buyer's Guide. Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1994). See also, Silva v. Stevens, Supreme Court of Vermont, 589 A. 2d 852 (1991) in which the "as is" clause is discussed and Bill Spreen Toyota, Inc. v. Jenquin, 163 Ga. App. 855, 294 S.E. 2d 533 (1982) is followed.

The District Court committed reversible error in granting Defendant Chris Motors Corporation's Motion for Summary Judgment (See July 31, 1995 Order granting summary judgment in favor of Chris Motors Corporation, (R 8-

54-1;) and November 2, 1995 Judgment entered in favor of Chris Motors Corporation, (R 9-77-1;) and the appellate panel of the Eleventh Circuit Court of Appeals committed reversible error in affirming the grant of Defendant Chris Motors Corporation's Motion for Summary Judgment, Appendix, pages 13a-15a, 16a-17a.

3. The Petition for Writ of Certiorari should be granted, for the reason that this District Court and the Eleventh Circuit Court of Appeals erred in overlooking and not considering material facts in the record that establish that there are genuine issues of material facts as to whether Plaintiff Linda Dagi is entitled to recover on her federal odometer fraud claim under 15 Unit[illegible] States Code §§ 1981, 1989, erred in overlooking and not considering decisions of the old (pre-November 1, 1980) Fifth Circuit Court of Appeals and decisions of the Eleventh Circuit Court of Appeals [Nieto v. Pence, 578 F.2d 640 (5th Cir. 1978); and Huycke v. Greenway, 876 F.2d 94 (11th Cir. 1989), which hold that a Plaintiff need not show actual intent to fraud in a federal odometer fraud claim, but may establish a violation of the Federal Odometer Act, by relying on circumstantial evidence to show constructive knowledge that the actual miles on a vehicle are greater than the miles shown on the odometer and greater than the miles shown on the federal odometer disclosure statement], which decisions are binding precedents under Bonner v. City of Pritchard, Alabama, 661 F.2d 1206 (11th Cir. 1980), the doctrine of *stare decisis* under Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S.Ct. 560, 116 L. Ed. 2d 560 (1991) and the rule of binding precedent under Johnson v. DeSoto County Board of Commissioners, 72 F.3d 1556 (11th Cir. 1996).

The District Court and the Eleventh Circuit Court of Appeals also erred in overlooking and not considering other

decisions that are persuasive authority, including Suits v. Little Motor Company 642 F. 2d 883 (5th Cir. 1987); Reiff v. Don Rosen Cadillac-BMW, Inc. 501 F. Supp. 77 (E.D. Penn. 1980); S & S Toyota, Inc. v. Kirby, Fla. App. 649 So. 2d 916 (1995) (following Nieto v. Pence) Fort Lauderdale Lincoln Mercury, Inc. v. Fallaro, Fla. App. 616 So.2d 594 (1993) (following Nieto v. Pence); and Bill Terry's, Inc. v. Atlantic Motor Sales, Inc. Fla. App. 409 So.2d 507 (1982) (following Nieto v. Pence).

Petitioner Linda Dagi shows that a Writ of Certiorari should be granted, since the July 31, 1995 Order of the District Court granting Defendant Chris Motors Corporation's motion for summary judgment, (R 8-54-1) and Appendix pages 26a-44a. and the November 21, 1996 Opinion and Judgment of the Eleventh Circuit Court of Appeals, Appendix, pages 13a-15a and 16a-17a, constitute a radical departure from established law, in that the District Court and the Eleventh Circuit Court of Appeals overlooked and did not consider decisions of the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals and that are binding precedents.

Consideration by the Supreme Court on Writ of Certiorari is necessary to secure and maintain uniformity of decisions of the Fifth Circuit Court of Appeals and the Eleventh Circuit Court of Appeals that are binding precedents. This is a question of exceptional importance to this Bench, the Bar and the public in that the appellate panel decision is in conflict with binding precedents and causes confusion and lack of uniformity as to the applicable law.

4. The Petition for Writ of Certiorari should be granted for the reasons that the United States District Court violated cardinal rules regarding decisions on motions for summary

judgment, when the District Courts in its July 31, 1995 and November 30, 1996 orders granting the motions for summary judgment of Defendants Chris Motors Corporation, Bayerische Motoren Werke, A.G. and BMW of North America, Inc., Appendix pages 26a-44a and Appendix pages 68a-90a, the District Court weighed the evidence and made credibility findings, contrary to the controlling legal standards applicable to motions for summary judgment as stated in Clemons v. Dougherty County, Georgia, 684 F.2d 1294, 1297 (11th Cir. 1982); Warrior Tombigbee Transportation Company, Inc. v. M/V Nan Fung, 695 F.2d 1294, 1297 (11th Cir. 1983); and Samples on Behalf of Samples v. City of Atlanta, 846 F.2d 1328 (11th Cir. 1988) and the United States Court of Appeals for the Eleventh Circuit abdicated its duty to conduct a de novo review, recognize and reverse the erroneous approach taken by the District Court, contrary to the standards stated in the Clemons, Warrior Tombigbee Transportation Company, Inc. and Samples on Behalf of Samples cases.

This erroneous approach in determining motions for summary judgment was also criticized by the Third Circuit Court of Appeals, in Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F. 2d 1358, (3rd Cir. 1992), in which the Court stated, at page 1363:

> "When deciding a motion for summary judgment . . . a court's role remains circumscribed in that it is inappropriate for a court to resolve factual disputes and to make credibility determinations."

Since the District Court and the Eleventh Circuit Court of Appeals erred in failing to apply the controlling legal standards in deciding the motions for summary judgment filed

by Chris Motors, BMW, AG, and BMW NA, this Court should grant a Writ of Certiorari, reverse the Order and Judgment granting summary judgment in favor of Chris Motors and reverse the Order and Judgment granting summary Judgment in favor of BMW AG and BMW NA. Therefore, both Case No. 95-9501 and Case No. 96-8025 should be reversed and remanded for trial on the merits.

5. The Petition for Writ of Certiorari should be granted, for the reason that the erroneous decision of the United States Court of Appeals for the Eleventh Circuit was reached because the Court of Appeals arbitrarily denied Appellant Linda Dagi's request for oral argument and arbitrarily assigned the case to the Non-Argument Calendar, contrary to the Court of Appeals' policy to grant oral argument where important and complex issues are presented on appeal.

At pages ii and iii of Brief of Appellant in Case Numbers 95-9501 and 96-8025 in the United States Court of Appeals for the Eleventh Circuit, Appellant Linda Dagi made the following Statement Regarding Oral Argument: Plaintiff/Appellant believes that oral argument is necessary in this case. Plaintiff/Appellant submits that this case is appropriate for assignment to the Oral Argument Calendar, for the reasons that: (1) this case is one of first impression as to error in denying a Motion to Remand a case to State Court, where it was not timely removed to Federal Court; (2) this case involves important issues pertaining to an automobile dealership's liability for common law fraud in connection with odometer disconnection and tampering, false representations as to the actual mileage on an automobile, false representations as to acid rain damage and the repainting of an automobile, and liability for violations of the Federal Odometer Fraud Act, 15 U.S.C. §§1981-1991; (3) this case involves an important issue

of the admissibility opinion testimony of a lay witness under Rule 701 of the Federal Rules of Evidence, in connection with Bill Hudson's affiant testimony that he had examined and photographed the tires on this BMW automobile and that, in his opinion, the BMW automobile has been driven more miles than the mileage shown on the odometer; (4) this case involves an important issue of the preclusion of use of expert witnesses; (5) this case involves an important issue as to the right of a party to amend her complaint to conform to the evidence in the case; (6) this case involves important issues as to an automobile manufacturer's strict liability for defects in the brakes, throttle housing unit, and floor mats of an automobile, strict liability for failure to warn about said defects in an automobile, strict liability for design defects in the odometer, and strict liability for failure to warn about design defects in the odometer; and (7) this case involves important issues as to an automobile importer/distributor's liability for negligence in failing to warn about design defects in the odometer of an automobile, and liability for deceit in failing to disclose that an automobile has been damaged by acid rain and repainted.

Counsel for Plaintiff has always found that oral argument is extremely important to clarify the facts, issues and law.

In a recent case in the Eleventh Circuit Court of Appeals, Michael v. Norfolk Southern Railway Company, 74 F. 3d 271 (11th Cir. 1996), oral argument was a crucial factor in obtaining the reversal of summary judgments in two wrongful death cases.

There are numerous law review articles authored by eminent jurists that show the importance of oral argument in cutting through the rhetoric in appellate briefs and focusing upon the crux of the issues to be decided. See, in this

connection: Bright & Arnold, Oral Argument - It May Be Crucial, 70 A.B.A. Journal 68 (December 1984), in which the author stated, at page 68: "oral argument most often changed my mind when it brought to the fore a significant fact that the briefs had not sufficiently emphasized, when the briefs had not stated an applicable rule of law clearly or correctly or when the issues of fact or law were close" (written by U.S. Circuit Court Judge Myron H. Bright and U.S. Circuit Court Judge Richard S. Arnold); Bright, The Power of the Spoken Word: In Defense of Oral Argument, 72 Iowa Law Review 35 (October 1986), in which the author states, at page 36: "In my opinion, oral argument is an essential component of the decision making process and plays an important role in assisting the appellate judge in reaching a decision. As I recently wrote in another article: The argument can isolate and clarify the core issues. [Vague points, complex points, and points that were simply overlooked] may become evident during oral argument." (written by U.S. Circuit Court Judge Myron H. Bright); C. HUGHES, THE SUPREME COURT OF THE UNITED STATES, pages 61-62 (1928)(in which Mr. Chief Justice Hughes wrote: "I suppose that, aside from cases of exceptional difficulty, the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote"); Harlan, What Part Does the Oral Argument Play in The Conduct on Appeal?, 41 Cornell Law Quarterly 6, 11 (1955)(in which Mr. Justice Harlan wrote that oral argument was perhaps the most effective weapon of the advocate and advised that it should be given the time and attention it deserves); Jackson, Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations, 37 A.B.A. Journal 801 (1951) (in which Mr. Justice Jackson stated: "I think that the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations . . . The Bar must make its preparation for oral argument on the principle

that it always is of the highest, and often controlling, importance."); and Rehnquist, Oral Advocacy, 27 South Texas Law Review 289 (Summer 1986) (in which Mr. Justice Rehnquist wrote, at page 289, footnote 1: "Justices of the Supreme Court of the United States have almost unanimously agreed that effective oral advocacy is one of the most powerful tools of the profession." Mr. Justice Rehnquist then quoted from the writings of Mr. Chief Justice Hughes, Mr. Justice Harlan, and Mr. Justice Jackson mentioned herein and went on to cite numerous other writings concerning the importance of oral arguments).

Petitioner Linda Dagi respectfully submits that the Court of Appeals for the Eleventh Circuit acted arbitrarily in denying her request for oral argument and acted arbitrarily assigning the case to the Non-Argument Calendar and that this arbitrary action kept the appellate panel from understanding the facts, the issues and the applicable law. Petitioner asks that a Writ of Certiorari issue to review this arbitrary denial of her request for oral argument and the arbitrary assignment of the case to a Non-Argument Calendar.

Petitioner respectfully submits that, had her request for oral argument been granted and Case Number 95-9501 and 96-8025 been assigned to an Oral Argument Calendar, the appellate panel would have understood the facts, the issues, and the applicable law and would not have entered the erroneous November 21, 1996 Opinion and Judgment, which decision affirmed the erroneous October 24, 1994 Order denying Plaintiff's Motion to Remand pursuant to 28 United States Code § 1447(o); affirmed the erroneous July 31, 1995 Order and November 2, 1995 Judgment granting defendant Chris Motor Corporation motion for summary judgment, and affirmed the erroneous November 30, 1995 Order and

December 1, 1995 Judgment granting the Motions for Summary Judgment of Defendant Bayerische Motoren Werke, A.G. (BMW AG) and Defendant BMW of North America, Inc. (BMW NA).

Had oral argument been presented in this case, the appellate panel would have:

A: followed the binding precedents requiring remand of the case to the State Court of Fulton County;

B: would have followed the decisions of the Supreme Court of Georgia and the Court of Appeals of Georgia which established:

(1) a plaintiff can elect to bring an action in tort for common law fraud and negligent misrepresentations recklessly made without rescinding a contract for purchase of an automobile;

(2) said fraud is not barred by an "as is" clause in a warranty disclaimer; and which decisions of the Supreme Court of Georgia and the Court of Appeals are binding precedents under Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938);

C: would have followed decisions of the old (pre November 1, 1980) Fifth Circuit Court of Appeals and the decisions of the Eleventh Circuit Court of Appeals, including Nieto v.

Pence, 578 F. 2d 640 (5th Cir. 1978); and Huycke v. Greenway, 1876 F. 2d 94 (11th Cir. 1989); which hold that a plaintiff need not show an actual intent to defraud in a federal odometer fraud claim, but may establish a violation of the Federal Odometer Act by relying on circumstantial evidence to show constructive knowledge that the actual mileage on a vehicle are greater than the miles shown on the odometer greater than the miles shown on the federal odometer disclosure statement, which decisions are binding precedents under Bonner v. City of Pritchard, Alabama, 661 F. 2d 1206 (11th Cir. 1980), and the doctrine of *stare decisis* under Hilton v. South Carolina Public Railway Commission, 502 U.S. 197, 112 S.Ct. 560 116 L. Ed. 2d 560 (1991) and the rule of binding precedent under Johnson v. DeSoto County Board of Commissioners, 72 F. 3d 1556 (11th Cir. 1996) and

D: would not have affirmed the erroneous July 31, 1995 Order granting summary judgments in favor of Defendants Chris Motor Corporation and would not have affirmed the erroneous November 30, 1995 Order granting summary judgment in favor of Defendants Bayerische Motoren Werke, A.G. and BMW of North America, Inc., since in both the July 31, 1995 Order and the November 30, 1995 Order, the District Court weighed the evidence and made credibility findings contrary to the controlling legal standards applicable to motions for summary judgment, as stated in Clemons v.

Dougherty County, Georgia, 684 F. 2d 1294, 1297 (11th Cir. 1982); Warrior Tombigbee Transportation Company, Inc. v. M/V Nan Fung, 695 F. 2d 1294, 1297 (11th Cir. 1983); Samples on Behalf of Samples v. City of Atlanta, 846 F. 2d 1328 (11th Cir. 1988); and Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F. 2d 1358 (3rd Cir. 1992).

CONCLUSION

For the reasons shown above, Petitioner Linda Dagi's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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